83-1936

NO.

in the

# Supreme Court

of the

# United States

October Term, 1983

AMERICAN INVESTMENT PROPERTIES, INC.,
a Florida corporation,
LEONARD E. TREISTER, and JEROME J. COHEN,
*Petitioners,*

*vs.*

VAREKA INVESTMENTS, N.V.,
a Netherlands Antilles Corp.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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69pp

## QUESTIONS PRESENTED FOR REVIEW

WHETHER THE ASSUMPTION OF DIVERSITY JURISDICTION BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WAS AN UNWARRANTED EXTENSION OF THE PROVISIONS OF 28 U.S.C.A. §1332.

WHETHER THE FEDERAL COURTS BELOW FAILED TO APPLY FLORIDA SUBSTANTIVE LAW, THUS VIOLATING PETITIONERS' DUE PROCESS RIGHTS AND THE *ERIE* DOCTRINE.

## LIST OF ALL PARTIES TO THE PROCEEDING

A list of all parties to the appeal before the United States Court of Appeals for the Eleventh Circuit is as follows:

1. AMERICAN INVESTMENT PROPERTIES, INC., (Defendant/Appellant) a Florida corporation. It has no parent companies, subsidiaries or affiliates.

2. LEONARD E. TREISTER (Defendant/Appellant)

3. JEROME J. COHEN (Defendant/Appellant)

4. VAREKA INVESTMENTS, N.V. a Netherlands, Antilles corporation (Plaintiff-Appellee)

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VAREKA INVESTMENTS, N.V.,
a Netherlands Antilles Corp.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-

styled cause on February 9, 1984, affirming the money judgment entered against Petitioners and in favor of Respondent by the United States District Court for the Southern District of Florida on June 4, 1982. The United States Court of Appeals denied Petitioners' Petition for Rehearing on March 21, 1984.

## OPINION DELIVERED BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Southern District of Florida. However, included in the Appendix are findings of fact and conclusions of law of the District Court entered on March 18, 1981; an Order of the District Court entered on November 6, 1981, granting Respondent's Motion for Partial Summary Judgment on the issue of liability, and directing a trial on the issue of damages; and findings of fact and conclusions of law entered on May 19, 1982 computing and directing the entry of a money judgment for damages against the Petitioners.

## JURISDICTION

A Final Judgment (on a consolidated basis) was signed and entered in the District Court on June 4, 1982. The judgment of the United States Court of Appeals for the Eleventh Circuit affirming the judgment of the District Court was entered on February 9, 1984. A timely Motion for Rehearing was denied by the United States Court of Appeals on March 21, 1984. This Petition for Writ of Certiorari is being filed within

90 days from the denial of such Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

## STATUTORY PROVISIONS INVOLVED

This appeal involves the following provisions of 28 U.S.C.A. §1332:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> * * *
>
> (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

This appeal also involves Rule 52(a) of the Federal Rules of Civil Procedure, which provides, in part,

"Findings of fact shall not be set aside unless clearly erroneous. . . ."

Finally, this appeal also involves the due process requirements of the Fifth Amendment to the United States Constitution which provides, in part:

> No person shall be . . . deprived of life, liberty or property, without due process of law. . . .

## STATEMENT OF THE CASE

This Petition evolves out of two consolidated actions filed by Respondent, Vareka Investments, N.V. ("Vareka") against Petitioners, American Investment Properties, Inc., ("AIP"), Leonard Treister ("Treister") and Jerome J. Cohen ("Cohen"), in which Vareka, as landlord, claimed that AIP, as tenant, breached a 1979 15 year net lease of an office park in Miami, Florida, resulting in alleged damages to Appellee in excess of $250,000.00; and that Treister and Cohen were therefore indebted to Vareka in the sum of $100,000.00 in the aggregate under their individual guaranty of the lease between Vareka and AIP.

Vareka is a Netherlands Antilles corporation. Diversity jurisdiction under 28 U.S.C.A. §1332 was invoked by Vareka. Petitioners' Answers contained affirmative defenses that the District Court lacked subject matter jurisdiction because of a lack of diversity of citizenship among the parties; and that under Florida law, damages had not yet been sustained and the actions were premature.

The actions were consolidated, and an evidentiary hearing on the jurisdictional issue was conducted to determine whether there was diversity jurisdiction in view of the fact that, although a Netherlands Antilles corporation, Vareka's only and principal place of business was in Miami, Florida, where it owned its sole asset, the office park in question. On March 18, 1981, findings of fact and conclusions of law were entered in which the District Court concluded it had subject matter jurisdiction because "Vareka was a passive investment company based in Quito, Ecuador." No separate order was entered.

Thereafter, on November 6, 1981, the District Court granted Vareka partial summary judgment on the issue of liability, and directed a trial of the issue of damages. A bench trial was conducted on February 16, 1982, and final judgment was entered on June 4, 1982, awarding Vareka a judgment against Treister and Cohen, jointly and severally, in the amount of $100,000.00, and against AIP in the amount of $548,503.09.

The United States Court of Appeals for the Eleventh Circuit affirmed, with opinion. (See Appendix annexed hereto). The issues raised before the Court of Appeals were whether the District Court had subject matter jurisdiction; whether the District Court correctly granted summary judgment; whether Vareka's cause of action for damages was premature under Florida law; whether Vareka properly mitigated those damages under Florida law; and whether there was sufficient evidence to support the District Court's award of damages. The questions presented on this Petition, as noted above, are whether the District Court improperly extended its limited

jurisdiction, and whether the failure to follow Florida law violated Petitioners' due process rights.

## STATEMENT OF THE FACTS

As noted in the Circuit Court's opinion, Vareka was incorporated under the laws of the Netherland Antilles on October 28, 1978 to serve as a passive investment vehicle. All of its shareholders are citizens and residents of the Republic of Ecuador, except for one who is a citizen of Italy and resides in Montreal, Canada. The Petitioners all are citizens and residents of Florida.

As the Circuit Court noted, on January 15, 1979 Vareka filed an "Application by Foreign Corporation for Authorization to Transact Business in Florida" with the Florida Department of State, in which Vareka listed a Miami address as the "address of principal office". Vareka simultaneously filed a Resident Agent Certificate with the Florida Secretary of State, designating an attorney at a Miami, Florida law firm as Vareka's resident agent. As found by the trial court, that law firm "had represented Vareka in the negotiations and consummation of the transaction, and continues to represent Vareka in Florida". The application, was granted and Vareka became qualified to transact business in Florida.

On January 22, 1979 Vareka entered into a sale-leaseback transaction with AIP, whereby AIP conveyed to Vareka title to an office park in Miami, Florida, containing approximately 60,000 square feet of gross rentable office space. Simultaneously AIP leased the office park back from Vareka on a 15-year net prime

lease, which will expire (if not sooner terminated by Vareka, now that it has obtained a judgment against Petitioners) on January 15, 1994. Treister and Cohen guaranteed AIP's performance for the first five years of this lease in the aggregate liability of $100,000.00.

AIP defaulted during August, 1979. Vareka commenced this law suit in Federal Court in September, 1979. On October 12, 1979 the District Court entered an order pursuant to a written stipulation signed by counsel for all the parties, authorizing Vareka to re-enter the office park pursuant to the prime lease between the parties. That stipulation and order expressly provided that they were without prejudice to the rights and defenses of any party against the other; and the order further expressly preserved Petitioners' rights to contest, *inter alia*, subject matter jurisdiction of the District Court.

Vareka elected to retake possession of the office park for the account of AIP. It did not terminate its prime lease with AIP. Vareka has conceded that upon and since retaking possession of the office park, it hired a management company to manage the office park and that Vareka has not attempted to find a new or substitute prime tenant to replace AIP.

The sale-leaseback transaction between Vareka and AIP was negotiated in Miami. Vareka's contract to purchase the office park was signed in Miami, Florida, and the transaction closed there. The funds used by Vareka to consummate the purchase were transmitted to and deposited in a Miami bank account prior to being paid to AIP. The prime lease between Vareka and AIP was entered into in Miami contemporaneously

with the sale. On two separate occasions, Vareka executed general powers of attorney, empowering its Miami attorneys to act as attorneys-in-fact for Vareka in connection with all aspects of the ownership, operation and management of the office park. AIP was instructed to and made all lease payments directly to a bank account maintained in Vareka's name in Miami, Florida. The sole signatories on Vareka's Miami bank account were its non-resident alien stockholders. That account was opened by Vareka prior to the closing in January, 1979, and has been actively maintained by it ever since.

Vareka was incorporated to acquire the office park in Miami, which is its sole asset. Vareka was incorporated in the Netherlands, Antilles, and not in the State of Florida, to avoid payment of United States income taxes. It has no officers or employees. It maintains no offices outside of the State of Florida. Vareka conducts no corporate meetings. Concededly, only two decisions were made in Quito, Ecuador, and they were made by Vareka's shareholders—namely, the shareholders' decision to purchase the office park, and the shareholders' decision relating to AIP's default. All of the documents between the parties (including the contract of purchase and the prime lease) relating to the office park provided for notification to be given to Vareka only in care of its Miami attorneys at the address listed on its Florida qualification as its "principal address", and nowhere else. Florida counsel had full authority to act for Vareka under the powers of attorney executed and delivered in Florida. Vareka's principal shareholder admitted that all of the books and records relating to the operations of the Miami office park were kept in Miami, Florida. The monthly rent payments were made by AIP to Vareka in Miami, by depositing the payments in Vareka's

Miami bank account, and all monthly reports by AIP (as well as Vareka's subsequent managing agent) were sent directly to Vareka's attorney-in-fact in Miami, at the address designated by Vareka as its "principal address". Vareka's Miami attorney-in-fact made the day-to-day decisions concerning the operation of the office park. During 1979, before and after the consummation of the sale-leaseback transaction, meetings were held in Miami between Vareka's managing director and Treister.

## REASONS FOR GRANTING WRIT OF CERTIORARI

### ISSUE I

### THE ASSUMPTION OF DIVERSITY JURISDICTION BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WAS AN UNWARRANTED EXTENSION OF THE PROVISIONS OF 28 U.S.C.A. §1332.

The Circuit Court, in affirming the conclusion of the District Court that it had subject matter jurisdiction, correctly stated that under 28 U.S.C.A. §1332(c) a foreign corporation is deemed to be a citizen of the state in which it has its principal place of business. It then stated that the question of Vareka's principal place of business "is a question of fact"; and that "[b]ased on the many facts decided by the district court, we conclude that the district court's holding that Vareka's principal place of business is in Ecuador, is not clearly erroneous".

In so ruling, the Court of Appeals has approved the District Court's unwarranted assumption of subject matter jurisdiction in diversity cases, far beyond that intended by Congress. The result will be to further overburden overburdened federal trial and appellate courts. Although a court of original jurisdiction, the district court also is a court of limited jurisdiction. The extension of diversity jurisdiction in this case flies in the face of 28 U.S.C.A. §1332.

The "total activity" of Vareka demonstrates that its principal place of business is in Miami, not Quito, Ecuador. As the district court found, it has no office in

Quito, Ecuador. Its sole asset is in Florida, where it maintains its sole bank account into which all of its income is deposited and from which all distributions to its shareholders are made. Its sole office address on all of the documents in evidence is a Miami, Florida address. It qualified to do business in Florida, designating a Miami address as its "principal office". All of the documents between the parties requires that *all* notices be sent to Vareka only at its Miami address. It negotiated and consummated the transaction in Florida with funds from a Miami bank account, and some of its shareholders attended meetings in Miami to further the business of Vareka. The activity, if any, that occurred in Quito was neither the "total" nor "major" activity of Vareka. Indeed, at best, it was the activity of Vareka's shareholders or investors, and not that of Vareka.

The Court of Appeals stated in its opinion that Vareka was formed in the Netherlands, Antilles "to serve as a passive investment vehicle". Other than the admission that Vareka was incorporated to allow its shareholders to funnel funds out of Ecuador to purchase income-producing real estate in the United States in a manner by which payment of United States taxes was to be avoided, the record is devoid of any evidence that Vareka was formed as "a passive investment vehicle". Even if it were, we are unaware of any case which holds that use of an alien corporation as "a passive investment vehicle" precludes a finding of "citizenship" in the forum, or which holds that 28 U.S.C.A. §1332 does not apply to alien corporations formed as "passive investment vehicles" to acquire income-producing property in the United States.

On the contrary, federal courts have consistently found presence in the forum by foreign corporations whose major or sole income-producing assets are located in the forum, despite the maintenance of offices outside the forum, and the actual conducting of directors' meetings and business outside the forum. *American-Foundation, Inc. v. Mountain Lake Corp.*, 454 F.2d 200 (5th Cir. 1972); *Danos v. Waterford Oil Co.*, 351 F.2d 940 (5th Cir. 1965); *Bruner v. Marjec, Inc.*, 250 F.Supp. 426 (W.D. Va. 1966); and *Bullock v. Wiebe Construction Co.*, 241 F.Supp. 961 (S.D. Ia. 1965). In the case at bar, the District Court found that Vareka maintained no office outside of Florida, nor was there any proof of any directors' meetings or business being conducted by Vareka in Ecuador.

The only contact that Vareka had with Quito, Ecuador, was that most of its shareholders/investors live there. It maintained no office there; it had no employees there; it conducted no activity, let alone significant or meaningful activity, there; it earned no income there; and it had no assets there. The Court of Appeals' opinion not only conflicts with the cases cited above, but it does not comport with *Jerguson v. Blue Dot Investment, Inc.*, 659 F.2d 31 (5th Cir. 1981), cert. denied 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982); *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980); and *Village Fair Shopping Center v. Sam Broadhead*, 588 F.2d 431 (5th Cir. 1979), cited by it in its opinion.

All of the evidence at the subject-matter-jurisdiction evidentiary hearing before the District Court was uncontested. Notwithstanding, the Court of Appeals strictly applied the clearly erroneous test of Fed.R.Civ.P.

52(a). Such strict application conflicts with its own decision in *Seaboard Coast Line R. Co. v. Trailer Trains Co.*, 690 F.2d 1343 (11th Cir. 1982); and with many other decisions, including *Marcum v. United States*, 621 F.2d 142 (5th Cir. 1980); *Swanson v. Baker Industries, Inc.*, 615 F.2d 479 (8th Cir. 1980); *Cooper v. Department of Navy of United States*, 594 F.2d 484 (5th Cir. 1979); *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976); and *Securities and Exchange Commission v. Coffey*, 493 F.2d 1304 (6th Cir. 1974).

## ISSUE II

### THE FEDERAL COURTS BELOW FAILED TO APPLY FLORIDA SUBSTANTIVE LAW, THUS VIOLATING PETITIONERS' DUE PROCESS RIGHTS AND THE *ERIE* DOCTRINE.

Because of Vareka's decision not to terminate the lease, but instead to take possession of the office park for the account of AIP, under Florida law Vareka's cause of action for damages for breach of the lease has not yet matured. Therefore, in Florida, Vareka's damages, if any, are not yet calculable or awardable. The District Court and Court of Appeals determined otherwise, contrary to Florida substantive law, thereby violating Petitioners' due process rights and the *Erie* doctrine. *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953) and *Hyman v. Cohen*, 73 So.2d 393 (Fla. 1954), both decided by the Florida Supreme Court, remain the law in Florida. They hold that having elected to resume possession for the account of AIP, Vareka's cause of action for damages does not accrue until the time when the lease would have normally expired, i.e., in 1994. Indeed, *Hyman v.*

*Cohen, supra,* was decided by the Florida Supreme Court *en banc*, and expressly noted (at p. 398) that the primary distinction between retaking of possession by a landlord for the landlord's own account, as compared to a retaking for the account of the tenant, concerns the timing of collecting damages. Vareka's suit is premature.

Also, when Vareka conceded before the District Court that it made no attempt to relet the premises or find a new prime tenant to assume AIP's position, it admitted its failure to comply with Florida substantive requirements that a lessor who retakes possession for the account of a lessee is obligated to mitigate its damages, failing which the lessor's right of recovery is entirely defeated. *Robinson v. Peterson*, 375 So.2d 294 (Fla. 2nd DCA 1979). See, also, *Coast Federal Savings and Loan Association v. DeLoach*, 362 So.2d 982 (Fla. 2nd DCA 1978).

By refusing to apply Florida law, the federal courts have accorded to *Vareka* a remedy which presently it does not have in Florida. The holdings of this Court in *Erie Railroad Company v. Tomkins*, 58 S.Ct. 817, 304 U.S. 64 (1938) and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 78 S.Ct. 893, 356 U.S. 525 (1958) require that Florida substantive law be applied to the facts of this case. The judgments below deny Petitioners their due process rights under the Fifth Amendment to the United States Constitution.

Parenthetically, it should be noted that Vareka has recently instituted an action against Petitioners in the Dade County Circuit Court of Florida to recover

"damages" purportedly accruing under the lease since entry of the District Court's judgment. The very issues which we have argued before the federal courts below, and which we again raise here, regarding the prematurity of Vareka's suit and the present inability to calculate and award damages, have been raised by AIP in defense of that new state court proceeding. In that proceeding, Vareka will attempt to bootstrap itself into Florida substantive regularity by arguing that the federal decisions below are *res judicata* and preclude Florida's review and determination of those issues. This Court should not countenance such a maneuver.

## CONCLUSION

As there was no diversity of citizenship, the District Court did not have subject matter jurisdiction. Petitioners' due process rights were violated when the federal courts failed to follow Florida substantive law and granted Respondent a judgment to which it is not entitled in state court.

Accordingly, it is respectfully requested that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

/s/ Lawrence H. Rogovin
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## CERTIFICATE OF SERVICE

The undersigned counsel of record for the Petitioners hereby certifies that on May 12th, 1984, he has served three (3) copies of the foregoing Petition for a Writ of Certiorari upon VANCE E. SALTER, ESQUIRE, STEEL, HECTOR & DAVIS, Attorneys for Respondent, 1400 Southeast Bank Building, 100 South Biscayne Boulevard, Miami, Florida 33131, by depositing same in a United States Mail Box, with first-class postage prepaid, addressed to said counsel for the Respondent at the foregoing post office address.

/s/ Lawrence H. Rogovin

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# Appendix

VAREKA INVESTMENTS, N.V., a
Netherlands Antilles Corp.,
*Plaintiff-Appellee,*

*v.*

AMERICAN INVESTMENT PROPERTIES, INC.,
a Florida Corp.,
*Defendant-Appellant.*

No. 82-5722.

United States Court of Appeals,
Eleventh Circuit.

Feb. 9, 1984.

Lessor brought action against lessee to recover damages resulting from commercial lease transaction and termination of lease. The United States District Court for the Southern District of Florida, Edward B. Davis, J., entered judgment in favor of lessor, and lessee appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) the District Court had subject-matter jurisdiction; (2) action could accrue before end of term of lease; (3) lessor satisfied Florida's requirement that lessor mitigate damages, and thus, was not precluded from recovering damages; (4) evidence was sufficient to seek damages; and (5) jurisdictional prerequisites for appeal were met.

Affirmed.

1. Federal Courts—300

A foreign corporation is deemed to be a citizen of state in which it has its principal place of business, for purposes of determining jurisdiction. 28 U.S.C.A. § 1332(c).

2. Federal Courts—300

One looks to the total activity of a corporation in order to determine its principal place of business, for purposes of determining jurisdiction. 28 U.S.C.A. § 1332(c).

3. Federal Courts—300

Question of corporation's principal place of business is a question of fact, for purposes of determining jurisdiction. 28 U.S.C.A. § 1332(c).

4. Federal Courts—275, 300

In action brought by lessor against lessee, district court's holding that lessor's principal place of business was in Ecuador was not clearly erroneous, and thus, since lessees were citizens and residents of Florida, district court had subject-matter jurisdiction where all shareholders of lessor corporation were citizens and residents of Ecuador, except for a citizen of Italy residing in Canada, and all corporate meetings were conducted and all corporate decisions were made in Ecuador. 28 U.S.C.A. § 1332(a, c).

5. Landlord and Tenant—195(2), 198, 202(1)

Under Florida law, when lease is breached by lessee, lessor may treat lease as terminated and retake possession for his own account, thus terminating any further liability on part of lessee, may retake possession of premises for account of lessee, holding lessee liable for difference between rental stipulated to be paid under lease agreement and what, in good faith, lessor is able to recover from reletting, or may stand by and do nothing, holding lessee liable for rent due as it matures.

6. Landlord and Tenant—202(1)

Where lease specifically provided that when lessor takes possession upon default and relets for account of lessee, lessee is liable for minimum rent due minus net proceeds of reletting on a monthly basis and provided that lessor was entitled to recover the same from tenant on each such day, and because parties had stipulated that lease was not terminated and that lessor was in possession of the premises for account of lessee, cause of action for damages could accrue before end of term of lease.

7. Landlord and Tenant—195(2)

Lessor satisfied Florida's requirement that lessor mitigate damages, and thus, was not precluded from recovering damages when lessee terminated lease where lessor obtained a firm to manage the office park and entered into subleases of offices with new and renewing subtenants.

8. Landlord and Tenant—231(8)

In action brought by lessor against lessee to recover damages upon termination of lease, there was sufficient detail to support expenses recoverable by lessor under terms of lease.

9. Federal Courts—668

Original motion of lessee to alter or amend judgment entered in favor of lessor in action brought by lessor did not address itself to the merits of the case; consequently, lessee was not required to have filed notice of appeal within 30 days after docketing of order denying motion to alter or amend. F.R.A.P.Rule 4(a)(4), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rules 59, 59(e), 60, 28 U.S.C.A.

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Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

In this diversity case, we review the district court's award of damages to a lessor resulting from a commercial lease transaction and the termination of the lease. We affirm.

## FACTS

Vareka Investments, N.V. (Vareka) was incorporated under the laws of the Netherlands Antilles on October 20, 1978, to serve as a passive investment vehicle. With the exception of a shareholder who is a citizen of Italy residing in Montreal, Canada, all of the shareholders of Vareka are citizens and residents of the Republic of Ecuador. Leonard E. Treister and Jerome J. Cohen were shareholders, officers, and directors of American Investment Properties, Inc. (AIP). In January, 1978, AIP purchased The Quarters Office Park. During 1978, a company half owned by Treister and Cohen, Greater American Management Corporation (GAMC), operated The Quarters Office Park (The Quarters). In January, 1979, Vareka purchased The Quarters from AIP. Simultaneously, AIP leased The Quarters back from Vareka under a fifteen-year net lease under which AIP was obligated to pay Vareka a minimum "net" return of Vareka's cash investment. AIP was also obligated to pay all expenses and assume all duties to the subtenants and to operate The Quarters. Vareka had no liability whatsoever for the operation, maintenance, or expenses of The Quarters. Treister and Cohen, individually, guaranteed AIP's performance under the lease for the first five years, with an aggregate liability of $100,000.

On January 15, 1979, Vareka filed an "Application by Foreign Corporation for Authorization to Transact Business in Florida" with the Florida Department of State. The State of Florida granted the application, and Vareka became qualified to transact business in Florida. The qualification listed as the "address of principal office" of Vareka, 1400 Southeast First National Bank Building, Miami, Florida. A Resident Agent Certificate

was also filed with the Secretary of State of Florida. On the certificate, Vareka designated an attorney at a Miami, Florida law firm as its resident agent. The law firm had represented Vareka in the negotiations and consummation of the transaction, and continues to represent Vareka in Florida.

In August, 1979, AIP notified Vareka that AIP intended to terminate the lease. The present actions were commenced in September, 1979, when Vareka filed suit. In October, 1979, the district court, authorized Vareka to re-enter the premises for the purposes of operation and management, pursuant to the lease agreement. Vareka hired Coldwell Banker Property Management Company (Coldwell Banker) to operate the property from October, 1979, through the date of the trial.

## PROCEDURAL HISTORY

On September 4, 1979, soon after AIP advised Vareka of its intent to terminate, Vareka sued AIP under the lease. On September 14, 1979, Vareka sued Treister and Cohen based on the Guaranty. The trial court consolidated the cases.

Vareka moved for partial summary judgment on liability. The district court withheld ruling on Vareka's motion for summary judgment pending a determination of whether the court lacked subject matter jurisdiction. After holding an evidentiary hearing and considering memoranda of law on the issue of jurisdiction, the district court concluded that subject matter jurisdiction existed. Thereafter, the district court granted Vareka's

motion for summary judgment as to the liability of AIP, Treister, and Cohen. The district court conducted a bench trial and found that Vareka suffered $548,000 in damages due to AIP's breach of the lease, and that Vareka was entitled to collect $100,000 of that amount from Treister and Cohen under the Guaranty. AIP, Treister, and Cohen (appellants) then filed a "Motion to Alter or Amend Judgment" and a "Notice of Appeal." The district court denied the motion to alter or amend judgment. The appellants did not file a new notice of appeal.

## ISSUES

On appeal, we must decide whether the district court correctly concluded that it had subject matter jurisdiction; whether the district court correctly granted summary judgment; whether Vareka's cause of action for damages was premature; whether Vareka properly mitigated those damages; whether there was sufficient evidence to support the district court's award of damages; and whether Federal Rule of Appellate Procedure 4(a)(4) requires dismissal of this appeal.

### A. Subject Matter Jurisdiction

[1, 2] Appellant, AIP, contends that the district court's finding that Vareka's principal place of business was in Quito, Ecuador, is clearly erroneous. After conducting an evidentiary hearing, the district court concluded that it had subject matter jurisdiction based on diversity. Under 28 U.S.C.A § 1332(c), a foreign corporation is deemed to be a citizen of the state in

which it has its principal place of business[1] *Jerguson v. Blue Dot Investment, Inc.*, 659 F.2d 31, 35 (5th Cir. 1981), *cert. denied*, 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982).[2] One looks to the "total activity" of the corporation in order to determine its principal place of business. *Village Fair Shopping Center v. Sam Broadhead Trust*, 588 F.2d 431, 434 (5th Cir.1979). This analysis incorporates both the "place of activities" test (focus on production or sales activities), and the "nerve center" test (emphasis on the locus of the managerial and policymaking functions of the corporation). *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313, 315 (5th Cir. 1980).

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[1]Title 28 U.S.C.A. § 1332(a) and (c) provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603d(a) of this title, as plaintiff and citizens of a State or of different States.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

[2]Former Fifth Circuit case, Section 9(1) of Public Law 96—152 —October 14, 1980.

[3] The question of a corporation's principal place of business is a question of fact. *Village Fair* at 433. Thus, we review the district court's determination that Vareka's principal place of business was Ecuador to determine whether it is clearly erroneous.

[4] The district court found that all of Vareka's sha eholders were citizens and residents of the Republic of Ecuador, with the exception of DiGiorgis, a citizen of Italy, residing in Montreal, Canada. Prior to institution of the present case, all corporate meetings were conducted, and all corporate decisions were made in Ecuador. The appellants were at all times relevant to this case residents and citizens of the state of Florida. The managing director of Vareka was a citizen and resident of Ecuador; the major investor in Vareka is an Ecuadorian corporation. Vareka was formed as a passive investment vehicle in order to invest funds inUnited States real estate. Jose Perez, the managing director of Vareka, received materials offering The Quarters for sale at his offices in Quito, Ecuador. In connection with the purchase of The Quarters, Vareka obtained loans from several Ecuadorian citizens. These loans were evidenced by promissory notes made, executed, and delivered in Quito, Ecuador. Under the long-term lease, AIP was obligated to pay all the expenses, assume all the duties to the subtenants, and operate The Quarters Office Park. Thus, Vareka was not involved in the day-to-day operation of this commercial property. At no time did any officer, director, employee, shareholder, or other representative of Vareka meet or communicate with any of the tenants at The Quarters. Likewise, no officer, director, employee, shareholder, or representative ever paid any utility bills, taxes, or service payments applicable to The Quarters, or take any other action which might be construed as operating or managing

the property. Vareka had no corporate office in Miami, Florida. Although Vareka did not maintain a distinct corporate office in Quito, Ecuador, it maintained its books and records and held corporate meetings in Quito. Vareka's books and records were maintained with the part-time assistance of Perez's legal secretary and the accountant of another shareholder, in Quito. Otherwise, Vareka had no employees in Florida or elsewhere. Vareka directed AIP to make all lease payments to a Miami bank account. The sole signatories on the bank account were investors of Vareka. In August, 1979, when AIP notified Vareka that it intended to terminate the lease, AIP sent the notification to Vareka in Quito, Ecuador, via telex. The investors and shareholders of Vareka then met in Quito and responded to the advice of termination.

AIP argues that the final negotiations and closing occurred in Miami, Florida. Vareka qualified to do business in Florida and appointed a resident agent in Miami, Florida. All payments were to be sent to a Miami address. Correspondence from Vareka to AIP emanated from the office of the Miami lawyer. Finally, Vareka maintained a bank account in Florida for the purpose of receiving and disbursing all payments relating to The Quarters.

Based on the many factors cited by the district court, we conclude that the district court's holding that Vareka's principal place of business is in Ecuador, is not clearly erroneous. Since all appellants were citizens and residents of the state of Florida, the district court correctly concluded that it had subject matter jurisdiction.

B. Summary Judgment as to Liability

AIP argues that because Vareka resumed possession of The Quarters on AIP's account, on an election of remedies theory, the cause of action for damages does not accrue until the end of the term of the lease.

The relevant portion of the Lease provides that the landlord may, without further notice to the tenant, in the event of default, exercise any one or more of the remedies set forth in the Lease. Section 9.02(b) provides:

> Landlord may, without barring later election of any other remedy and without terminating this lease, at any time and from time to time (i) re-enter the premises with or without process of law, and manage and operate the same (ii) sub-lease any vacant portion of the Premises or any part or parts thereof, to any persons, and (iii) assume Tenant's interest in any or all subleases, for the account of Tenant or otherwise, and receive and collect the rents therefrom. In the latter event Landlord shall apply such rents first to the payment of such expenses as Landlord may have paid, assumed or incurred in recovering possession of the Premises, including costs, expenses, attorney's fees, and for placing the same in good order and condition or preparing or altering the same for subleasing, and all other expenses, commissions, and charges paid, assumed or incurred by Landlord in or in connection with subleasing the Premises, and then to the fulfillment of the covenants of Tenant. Any such subleasing as provided for herein may be for the remainder of the term of this lease or for a longer or shorter period. Landlord may execute any sublease

made pursuant to the terms hereof either in Landlord's own name or in the name of Tenant, or assume Tenant's interest to and in any existing sublease of the Premises, as Landlord may see fit. No subtenant shall in any such event be under any obligation for the application by Landlord of any rent collected by Landlord from such subtenant to any and all sums due and owing under the provisions of this lease. In such event Tenant shall have no right or authority whatever to collect any rent whatever from any subtenant on the Premises. In any case, and whether or not the Premises or any part thereof be re-let Tenant, until the end of what would have been the term of this lease in the absence of such expiration and whether or not the Premises or any part thereof shall [have] been re-let shall be liable to Landlord for, and shall pay to Landlord, any amount equal to:

(i) all Minimum Rent and Additional Rent which is otherwise payable under this lease, less

(ii) the net proceeds, if any, of any re-letting effected for the account of Tenant pursuant to the provisions of this Section 9.02, after deducting all Landlord's expenses in connection with such re-letting, including, without limitation, all repossession costs, brokerage commissions, legal expenses, attorneys' fees, expenses of employees, alteration costs, and expenses of preparation for such re-letting.

Tenant shall pay such amount to Landlord monthly on the days on which the Minimum Rent is payable

> under this lease, and Landlord shall be entitled to recover the same from Tenant on each such day.

[5] In its May 19, 1982, order, the district court correctly stated that under Florida law, a lessor has an election of three alternative courses of action when the lease is breached by the lessee.

> The lessor may treat the lease as terminated and retake possession for his own account, thus terminating any further liability on the part of the lessee; or the lessor may retake possession of the premises for the account of the lessee, holding the lessee liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the lessor is able to recover from a re-letting; or the lessor may stand by and do nothing, holding the lessee liable for the rent due as it matures, which means all remaining rent due if there is an acceleration clause and the lessor chooses to exercise the right to accelerate.

*Coast Federal Savings and Loan Association v. DeLoach*, 362 So.2d 982 (Fla.App. 1978). Re-entering the premises and re-letting for the account of the lessee is, thus, a remedy available under both the Lease and Florida law. Section 9.02(b) of the Lease.

[6] In this case, the parties are in agreement, and the district court concluded, that the lease has not been terminated. Vareka re-entered The Quarters to manage and operate it for the account of AIP, pursuant to section 9.02(b). AIP argues that under Florida law a lessor's cause of action for damages does not accrue until the time when the forfeited term, if it had not

been forfeited, would have expired. *Hyman v. Cohen*, 73 So.2d 393, 398 (Fla. 1954); *Kanter v. Safran*, 68 So.2d 553, 558 (Fla. 1953). Consequently, the court's grant of summary judgment regarding liability was error at this time. AIP also cites *Coast Federal Savings* for the proposition that when a lessor retakes possession for the account of the lessee, he loses the right to recover the full amount of the remaining rental due under an acceleration clause. *Coast Federal Savings and Loan Association v. DeLoach*, 362 So.2d 982, 984 (Fla. 1978).

*Coast Federal Savings* is distinguishable. In this case, Vareka does not seek to recover "the full amount of remaining rental due." In its May 29, 1982, order, the district court specifically stated:

> Issues have been raised and arguments have been presented concerning prospective rights and liabilities under the lease agreement. This ruling does not address those issues. It deals *only with the liability of the defendants up to the date of trial.* Whether the defendants could seek a recovery of future profits, should they ever exist, if the plaintiff continues to hold the property for their account, remains an open question. [Emphasis added.]

Neither *Kanter* nor *Hyman* preclude summary judgment as to liability. The district court correctly cited *Chandler* for the proposition that, under Florida law, parties may negotiate any contract not violative of law or public policy. *Chandler Leasing Division, etc. v. Florida-Vanderbilt Development Corp.*, 464 F.2d 267, 271 (5th Cir.), *cert. denied*, 409 U.S. 1041, 93 S.Ct. 527, 34 L.Ed.2d 491 (1972). In *Chandler* the court stated,

> We recognize that under the Florida case law there are three remedies available to lessors when their lessees breach a lease agreement. However, these remedies are not established as the sole remedies which may be provided for lease breaches, but are intended to supply remedies when none are provided in the lease or when broader contractual lease remedies violate public policy.

In this case, the lease specifically provides that when the landlord takes possession upon default and re-lets for the account of the tenant, the tenant is liable for minimum rent due minus the net proceeds of re-letting on a monthly basis. Further, the lease entitled the landlord to "recover the same from Tenant on each such day."

Because the parties have stipulated that the lease was not terminated and that Vareka is in possession of the premises for the account of AIP, the district court correctly granted summary judgment as to liability based upon section 9.02(b) of the lease.

C. Accrual of the Cause of Action for Damages

[7] AIP also argues that under Florida law, a lessor operating for the account of the lessee has an affirmative duty to mitigate damages by making a good-faith effort to re-let the premises. *Robinson v. Peterson*, 375 So.2d 294, 296 (Fla.App. 1979). AIP argues that hiring Coldwell Banker to operate the office park and entering into subleases of office suites with new and renewing subtenants did not satisfy the affirmative duty to use good efforts to re-let. At oral argument, it

became clear that AIP's position is that Vareka was required to re-let the premises to a prime tenant, such as AIP had been, who would then sublease to other tenants.

AIP correctly states Florida law:

> Had the lessee prevailed on the question of whether the lessor did in fact use good efforts to re-let, the lessor's right of recovery would have been entirely defeated.

*Robinson v. Peterson* at 297. This language does not preclude recovery of damages in this case.

After resuming possession, Vareka retained Coldwell Banker Property Management Corporation to manage The Quarters. Although Coldwell Banker did not find a new prime tenant, AIP concedes that Coldwell Banker entered into subleases of office suites with new and renewing subtenants. The cases cited by AIP for the proposition that Vareka had an affirmative duty to re-let, *Robinson v. Peterson* and *Coast Federal Savings*, both involve a single lease rather than a "prime lease and sublease" fact pattern. *Robinson v. Peterson*, 375 So.2d 294 (Fla.App.1979); *Coast Federal Savings and Loan Association v. DeLoach*, 362 So.2d 982 (Fla.App.1978). Thus, in their single lease fact patterns, "re-letting" was the only means available to mitigate damages. In *Kantor v. Safran*, the court stated:

> [This case] eliminates any thought that the lessor is necessarily required to seek an assignment of the defaulting lessee's specific interests or to sell only the remaining term of the original lease, since

> that term is 'at an end.' He is required only to recoup only what he can in good faith, consistent with his own interest as well as that of the defaulting lessee.

*Kanter v. Safran*, 82 So.2d 508, 509 (Fla. 1955). Although not specifically applicable to this case, *Kanter* indicates that Florida law requires a good-faith effort to mitigate damages as opposed to requiring mitigation of damages by specific method. Further, section 9.02(b) of the lease specifically gives the landlord authority to execute any subleases and specifies that the tenant is liable for damages "whether or not the Premises or any part thereof be re-let." Because the district court found that Coldwell Bankers management had "been efficient and successful," Vareka satisfied Florida's requirement that the lessor mitigate damages and thus, was not precluded from recovering damages.

D. Mitigation of Damages

[8] AIP asserts that the documentary evidence was insufficient to show damages. Upon re-entry, Vareka retained Coldwell Banker Property Management Corporation to manage the operation of The Quarters Office Park. Review of the record indicates that there was sufficient detail to support the expenses recoverable by Vareka under the terms of the lease. The district court concluded that the "monthly reports for the operation of The Quarters, as prepared by Coldwell Banker, are not in error." Thus, we find the district court's award of damages correct.

E. The Jurisdictional Prerequisites of Rule 4(a)(4)

[9] Vareka argues that AIP's trial court motion to alter or amend was not in fact a motion under Fed.R.Civ.P. 60, but a motion to alter or amend under Fed.R.Civ.P. 59(e). Consequently, AIP should have filed a notice of appeal within thirty days after docketing of the order denying the motion to alter or amend. Fed.R.App.P. 4(a)(4).

On June 14, 1982, AIP filed a motion to alter or amend pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure. On July 9, 1982, the district court, without discussion, denied the motion. On October 29, 1982, a panel of this court denied Vareka's motion to dismiss this appeal, stating that the trial court motion in question was to be treated as a "rule 60 motion rather than a rule 59 motion, so that Fed.R.App.P. 4(a)(4) does not apply." The panel correctly denied the motion to dismiss. Review of AIP's original motion to alter or amend did not address itself to the merits of the case, as Vareka argues. Consequently, this appeal is properly before the court. *Smith v. United States Parole Commission*, 721 F.2d 346 (11th Cir.1983).

We therefore affirm the final judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5722

D.C. DOCKET Nos. 79-03986
79-04260

VAREKA INVESTMENTS, N.V.,
a Netherlands Antilles Corp.,
*Plaintiff-Appellee,*

*versus*

AMERICAN INVESTMENT PROPERTIES, INC.,
a Florida Corp.,
*Defendant-Appellant.*

**Appeal from the United States District Court for the Southern District of Florida**

Before RONEY, HATCHETT and ANDERSON, Circuit Judges.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREROF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 9, 1984
For the Court: Spencer D. Mercer, Clerk

ISSUED AS MANDATE:

By: [signature illegible]
Deputy Clerk

[FILED MAR 21 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5722

VAREKA INVESTMENTS, N.V.,
A Netherlands Antilles Corporation,
*Plaintiff-Appellee,*

*versus*

AMERICAN INVESTMENT PROPERTIES INC.,
a Florida Corporation,
*Defendant-Appellant.*

**Appeal from the United States District Court for the Southern District of Florida**

**ON PETITION FOR REHEARING**

(MAR 21 1984)

Before RONEY, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

[signature illegible]
United States Circuit Judge

REHG-4
(Rev. 6/82)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-3986-CIV-EBD
79-4260-CIV-EBD

VAREKA INVESTMENTS, N.V.,
*Plaintiff,*

*-vs-*

AMERICAN INVESTMENT PROPERTIES, INC.,
*Defendant.*

VAREKA INVESTMENTS, N.V.,
*Plaintiff,*

*-vs-*

LEONARD E. TREISTER and JEROME J. COHEN,
*Defendants.*

**FINDINGS OF FACT**
**AND**
**CONCLUSIONS OF LAW**

On February 16, 1982, the Court, sitting without a jury, conducted a trial in this consolidated action. The issue of damages was the only unresolved matter in this litigation. The liability of the corporate defendant, AMERICAN INVESTMENT PROPERTIES, INC., under the lease and the liability of the individual defendants, LEONARD E. TREISTER and JEROME E. COHEN, under the Guaranty, had previously been determined by this Court's Order of November 5, 1981 granting

Plaintiff's Motion for Partial Summary Judgment. Upon consideration of the evidence adduced at trial, the memoranda and arguments presented by counsel, and in light of the entire record in this case, the Court does make and enter the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. The court has jurisdiction over the parties and subject matter of this action pursuant to 28 U.S.C. § 1332.

2. There are no remaining factual issues with respect to the execution, delivery or validity of the Lease or Guaranty.

3. The parties entered into a sale/lease back transaction in January, 1979, for an Office Park known as the "Quarters". The agreement provided that the lease would be a net lease.

4. In August, 1979, the defendant, AMERICAN INVESTMENT PROPERTIES, repudiated the lease agreement. Their actions in this regard constituted a breach of the Lease.

5. After the breach, the plaintiff re-entered the premises to operate and manage the Quarters Office Park for the account of American Investment Properties.

6. The Plaintiff has not terminated the Lease. They are in possession of the premises to manage and operate it for the account of American Investment Properties.

7. The remedy of operating the premises for the account of the leasee is the second of three available remedies under Section 9.02(b) of the Lease.

8. The Plaintiff retained Coldwell Banker Property Management Corporation to manage the operations of the Quarters Office Park. Coldwell Banker is a professional nationally-recognized property management.

9. The property management service provided by Coldwell Banker has been efficient and successful.

10. The management fees and leasing commissions charged by Coldwell Banker are reasonable.

11. The Lease was negotiated at arms length by commercially knowledgeable parties, assisted by experienced counsel.

12. Issues have been raised and arguments have been presented concerning prospective rights and liabilities under the Lease Agreement. This ruling does not address those issues. It deals only with the liability of the defendants up to the date of trial. Whether the Defendants could seek a recovery of future profits, should they ever exist, if the Plaintiff continues to hold the property for their account, remains an open question.

13. The Quarters operated at a net less (sic) for the years 1979, 1980, and 1981.

14. The evidence persuades the Court that the monthly reports for the operation of the Quarters, as prepared by Coldwell Banker, are not in error.

15. The minimum rent due under the lease, as established by the records of Coldwell Banker is as follows:

| Date Rent Due | Amount Due |
|---|---|
| 8/15/79 | $ 8,137.25 |
| 9/15/79 | 8,137.25 |
| 10/15/79 | 10,417.63 |
| 11/15/79 | 10,705.70 |
| 12/15/79 | 10,705.70 |
| 1/15/80 | 10,705.70 |
| 2/15/80 | 10,705.70 |
| 3/15/80 | 10,705.70 |
| 4/15/80 | 10,705.70 |
| 5/15/80 | 10,705.70 |
| 6/15/80 | 10,705.70 |
| 7/15/80 | 10,705.70 |
| 8/15/80 | 10,705.70 |
| 9/15/80 | 10,705.70 |
| 10/15/80 | 10,705.70 |
| 11/15/80 | 10,705.70 |
| 12/15/80 | 10,705.70 |
| 1/15/81 | 10,705.70 |
| 2/15/81 | 10,705.70 |
| 3/15/81 | 10,705.70 |
| 4/15/81 | 10,705.70 |
| 5/15/81 | 7,038.36 |
| 6/15/81 | 10,705.70 |
| 7/15/81 | 10,705.70 |
| 8/15/81 | 10,705.70 |
| 9/15/81 | 10,705.70 |
| 10/15/81 | 9,708.88 |
| 11/15/81 | 10,705.70 |

| Date Rent Due | | Amount Due |
|---|---|---|
| 12/15/81 | | 10,705.70 |
| 1/15/82 | | 10,705.70 |
| 2/15/82 | | 705.70 |
| | TOTAL | 311,787.57 |

16. In the period following the breach the plaintiff was forced to expend $152,771.05 for operating expenses beyond the proceeds realized from operating income.

17. These payments are as follows:

| | | |
|---|---|---|
| Mortgage — Sept. '79 | 9/4/79 | 16,016.01 |
| August and Sept. '79 Parking Lot Rent | 9/11/79 | 554.68 |
| Sewer Lift Station Contribution August and Sept. '79 | 9/11/79 | 75.00 |
| Florida Power & Light | 9/14/79 | 10,884.14 |
| Florida Power & Light | 9/28/79 | 10,987.46 |
| Mortgage — Oct. '79 | 9/28/79 | 16,016.01 |
| Maintenance Personnel | 10/12/79 | 475.25 |
| Mortgage — Nov. '79 | 11/16/79 | 16,016.01 |

| | | |
|---|---|---|
| Coldwell Banker Property Management – Operating Expense | 11/16/79 | 5,133.67 |
| Florida Power & Light | 11/16/79 | 10,381.82 |
| Maintenance Personnel | 11/16/79 | 731.00 |
| Coldwell Banker Property Management – Operating Expenses | 1/8/80 | 15,000.00 |
| Coldwell Banker Property Management – Operating Expenses | 3/18/80 | 10,000.00 |
| Coldwell Banker Property Management – Operating Expenses | 4/14/80 | 30,500.00 |
| Coldwell Banker Property Management – Operating Expenses | 6/2/80 | 10,000.00 |
| | TOTAL | 152,771.05 |

## CONCLUSIONS OF LAW

1. Under Florida law, a Lessor has an election of three alternative courses of action where the lease is breached by the Leasee.

a. The Lessor may treat the lease as terminated and retake possession for his own account, thus terminating any further liability on the part of the lessee; or

b. The lessor may retake possession of the premises for the account of the lessee, holding the lessee liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the lessor is able to recover from a reletting, or

c. The lessor may stand by and do nothing holding the lessee liable for the rend (sic) due as it matures.

*Coast Federal Savings & Loan Association v. DeLoach*, 362 So.2d 982 (Fla.2d DCA 1978).

2. Re-entering the premises and reletting for the account of the lessee in one of the three available remedies under both the Lease and Florida Law. *Coast Federal Savings & Loan Association v. DeLoach, supra;* Section 9.02(b) of the Lease.

3. After re-entry for the breach of a lease agreement, the landlord in reletting is not an agent in a true sense. The Landlord is merely using a prescribed method to ascertain the damages. *Kanter v. Safran*, 68 So.2d 553 (Fla. 1953).

4. Upon re-entry for the account of the Lessee, the Lessor is not required to seek an assignment of the defaulting lessee specific interest. Rather, the Lessor is required only to recoup what he can in good faith consistent with his own interest, as well as that of the defaulting lessee. *Kahn v. Safran*, 82 So.2d 508, 509 (Fla. 1955).

5. The lease agreement provides that where the Landlord takes possession upon a default and relets for

the account of the Tenant, the minimum rent due less the net proceeds of reletting shall be paid monthly on the day which the rent would have fallen due if there had not been a default. Furthermore, it entitles the Landlord "to recover the same from [the] Tenant on each such day." Section 9.02(b) of the Lease.

6. The parties to a lease are free to negotiate on any terms they choose so long as the terms do not violate the law or public policy. *Chandler Leasing Division v. Florida Vanderbilt Development Corp.*, 464 F.2d 267 (5th Cir.1972).

7. The parties clearly expressed an intention in the Lease to make American Investment Property responsible for monthly deficits as they arose after re-entry by the Plaintiff for the defendant's account. Such a provision does not offend public policy. It is nothing more than a specific type of an acceleration clause negotiated to act in harmony with the other terms of the agreement.

8. Section 8.01 of the Lease entitles the Landlord to make payments and to perform acts required by the Lease which the Tenant has failed to handle. All sums paid under this section together with interest at a rate of 15% per annum from the date of payment become an obligation of the Tenant to the Landlord.

9. Section 11.02 of the Lease obligates the Tenant to pay the monthly installments on the existing mortgage held by Teachers Insurance and Annuity Associates of America. It also provides that where the Tenant does not pay the mortgage installments in a timely fashion, the Landlord is entitled to make these payments and

look to the Tenant for any sums paid together with interest at a rate of 15% per annum from the date of payment.

10. Under Florida law, a lessor is entitled to interest on unpaid rent. *Robinson v. Peterson*, 375 So.2d 294 (Fla.2d DCA 1979) Section 83.06 (2), Florida Statutes, provides as follows:

> All contracts for rent, verbal or in writing, shall bear interest from the time the rent becomes due, any law, wage or custom to the contrary notwithstanding.

11. The prejudgment rate of interest in Florida, in the absence of a contrary rate established by contract, is 6% per annum. Section 687.01, Florida Statutes.

12. Since the damages proven by the Plaintiff under the lease exceed $100,000.00 in amount, the plaintiff is entitled to recover $100,000.00 from the Defendants Treister and Cohen, who are jointly and severally liable to the plaintiffs for that sum under the terms of the Guaranty.

The awards of damages as set forth in these Findings of Fact and Conclusions of Law shall be incorporated in a separate Final Judgment which shall be prepared by Plaintiff's counsel.

DONE and ORDERED this 19th day of MAY, 1982.

/s/ Edward B. Davis
UNITED STATES
DISTRICT COURT JUDGE

Copies Furnished To:

Vance E. Salter, Esq.
Lawrence H. Rogovin, Esq.

[FILED NOV 6 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-3986-CIV-EBD
79-4260-CIV-EBD

VAREKA INVESTMENTS, N.V.,
*Plaintiff,*

*-vs-*

AMERICAN INVESTMENT PROPERTIES, INC.,
*Defendant.*

VAREKA INVESTMENTS, N.V.,
*Plaintiff,*

*-vs-*

LEONARD E. TREISTER and JEROME J. COHEN,
*Defendants.*

**ORDER**

THIS MATTER has come before the Court on the following motions:

1. Plaintiff's motion for partial summary judgment against the Defendant, AMERICAN INVESTMENT PROPERTIES, INC., in Case No. 79-3986-CIV-EBD.

2. Plaintiff's motion for summary judgment against Defendants, LEONARD E. TREISTER and JEROME J. COHEN as to their liability as guarantors in Case No. 79-4260-CIV-EBD.

The Court has reviewed the motions, the supporting affidavits and documents, as well as the opposing papers filed by the Defendants. Upon consideration of these motions, in light of the entire record in this cause, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's motion for partial summary judgment against the Defendant, AMERICAN INVESTMENT PROPERTIES, INC., in Case No. 79-3986-CIV-EBD is Granted as to liability, but denied as to damages. The deposition testimony of Mr. Treister, an officer and director of American Investment Properties, clearly establishes that American Investment repudiated the lease agreement. Section 9.02(b) of the lease provides that, upon default by American Investment, Vereka might re-enter the premises, with of (sic) without process of law, and manage and operate the facility. The lease further provides that is (sic) such event, American Investment would remain liable to Vareka for the minimum rent and all costs and expenses of operation. Under Florida law Vareka is entitled to demand and sue to recover such rent and expenditures on a periodic basis. *Coast Federal Savings & Loan Association v. De Loach*, 362 So.2d 982 (Fla. 2d DCA 1978). While liability has been established, there are still issues of fact concerning damages which would make that issue inappropriate for summary judgment.

2. Plaintiff's motion for summary judgment against Defendants, Leonard Treister and Jerome Cohen, as to their liability as guarantors in Case No. 79-4260-CIV-EBD is granted. Should Vareka sucessfully prove any damages resulting from the breach of the lease agreement, Treister and Cohen shall be jointly and severally liable up to the sum of $100,000.00. There is no dispute as to the validity of the written Guaranty executed by Treister and Cohen as part of the lease agreement. Since the Court has determined that the lease was breached. Treister and Cohen become liable under the Guaranty to the extent of $100,000.00 as provided for in the instrument.

DONE AND ORDERED this 5th day of November, 1981.

/s/ Edward B. Davis
UNITED STATES
DISTRICT COURT JUDGE

Copies Furnished to:

Lawrence H. Rogovin, Esq.
Vance E. Salter, Esq.

[FILED MAR 18 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 79-3986-CIV-EBD
79-4260-CIV-EBD

VAREKA INVESTMENTS, N.V., etc.,
*Plaintiff,*

*-vs-*

AMERICAN INVESTMENT PROPERTIES, INC.,
*Defendant.*

VAREKA INVESTMENTS, N.V., etc.,
*Plaintiff,*

*-vs-*

LEONARD E. TREISTER and JEROME J. COHEN,
*Defendant.*

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 5, 1981, an evidentiary hearing was conducted to determine whether this Court had subject matter jurisdiction over the claims alleged in this lawsuit. The asserted basis of jurisdiction as set forth in the complaint is diversity pursuant to 28 U.S.C. § 1332(c).

For diversity purposes, alien corporations have dual citizenship. They are citizens of both the alien corporation's foreign country of incorporation and the state or country in which the corporation has established its principal place of business. *Richmond Construction Corp. v. Hilb*, 482 F. Supp. 1201 (M.D. Fla. 1980). In this circuit, the "total activity" test is the legal standard used for determining the principal place of business for a corporation. *Village Fair Shopping Center v. Sam Brodhead Trust*, 588 F.2d 431 (5th Cir. 1979). This test requires a "thorough review" of the corporation's total activities. Furthermore, the facts and circumstances which comprise the activities of the corporation must be considered as of the time the complaint was filed. *Ray v. Bird & Son Asset Realization Co.*, 519 F.2d 1081 (5th Cir. 1975).

The Court has reviewed the entire record in this case, as well as the evidence presented of February. In applying the applicable law to these facts, the Court does make and enter the following findings:

1) *Vareka Investments, N.V. v. American Investment Properties, Inc.*, Case No. 79-3986-CIV-EBD was commenced September 4, 1979.

2) *Vareka Investments, N.V. v. Leonard E. Treister and Jerome J. Cohen*, Case No. 79-4260-CIV-EBD, was commenced on September 14, 1980 (sic).

3) Vareka Investments, N.V. ("Vareka") was incorporated under the laws of the Netherlands Antilles on October 20, 1978.

4) All of the shareholders of the Plaintiff were and are citizens and residents of the Republic of Ecuador, with the exception of Mr. Marcello DiGiorgis, a citizen of Italy residing in Montreal, Canada.

5) All of the shareholders of the Plaintiff except Mr. DiGiorgis are residents of Quito, Ecuador; on and before September 14, 1979, all corporate meetings were conducted, and all corporate decisions were made, in Quito.

6) At all times pertinent to the issue, the defendants were, and still are, residents and citizens of the State of Florida.

7) The managing director of the plaintiff corporation is Jose Maria Perez who is a citizen and resident of Ecuador, and a practicing lawyer in Quito, Ecuador.

8) The major investor in plaintiff corporation is Menatlas Construction Company, an Ecuadorian corporation. Menatlas is owned and controlled by Federico Arteta, Jose Perez' uncle.

9) Vareka was formed as a passive investment vehicle. The shareholders sought to invest funds in real estate in the United States.

10) The Quarters is an office building complex in Miami, Florida.

11) AIP had purchased The Quarters in January, 1978 for aggregate consideration of approximately $2,320.00, and had operated the property during 1978 through Greater American Management Corporation

("GAMC"), a company one-half owned by the defendants, Triester and Cohen.

12) Mr. Jose Maria Perez received materials offering The Quarters for sale in 1978 at his offices in Quito.

13) In January, 1979, Vareka purchased The Quarters from AIP and simultaneously leased back The Quarters to AIP.

14) The closing of the transaction by which the plaintiff purchased The Quarters occurred in Miami, Florida on January 22, 1979.

15) The closing of the transaction by which the plaintiff purchased The Quarters occurred in Miami, Florida on January 22, 1979 (sic).

16) The sale price in the January, 1979 transaction was approximately $3,065.00 (sic).

17) The directors and investors of the plaintiff contributed cash for the acquisition of their respective ownership interests. Those monies were transmitted to and deposited in the Miami, Florida trust account of plaintiff's attorneys and were used to pay the cash portion of the purchase price of The Quarters at closing.

18) In connection with the purchase of The Quarters, the plaintiff obtained loans from several citizens of Ecuador. The loans were evidenced by promissory notes which were made, executed, and delivered in Quito, Ecuador.

19) The long-term lease entered into contemporaneously with the sale by AIP obligated to:

a. Make payments of Minimum Rent, as defined in Section 2.01 of the Lease:

b. Make all payments due under the first mortgage, and all tax, insurance, waste, utility, maintenance, service and any other payments applicable to The Quarters. [Lease, Section 2.02];

c. Keep The Quarters properly repaired and maintained [Lease, Section 7.03] and in compliance with applicable governmental requirements. [Lease, Section 7.05]; and

d. Operate The Quarters. [Lease, Section 7.03].

20) The Lease was a "net" lease [Lease, Section 2.06], whereby Vareka was to have no liability whatsoever for the operation, maintenance, or expenses of The Quarters.

21) The Lease was for a basic term of 15 years [Lease, Section 1.02].

22) On January 15, 1979, the plaintiff filed with the Florida Department of State, in Tallahassee, Florida, "Application by Foreign Corporation for Authorization to Transact Business in Florida". This application was granted. As a result, Vareka became qualified to transact business in the State of Florida. This Qualification lists

as the "address of principal office" of the Plaintiff, 1400 Southeast First National Bank Building, Miami, Florida.

23) A Resident Agent Certificate was also filed with the Florida Secretary of State. On this certificate, the plaintiff designated Jose Luis Castro, an attorney at the law firm of Steel, Hector and Davis, as its resident agent, upon whom process may be served.

24) Mr. Jose Perez had negotiated the purchase of The Quarters from the defendants in Miami, Florida. The firm of Steel, Hector & Davis represented the plaintiff in the negotiation and consummation of the transaction, and has continued to represent the plaintiff in Florida at all pertinent times since.

25) The plaintiff employed attorneys in Miami for the purposes of:

a) Providing legal representation in the sale/leaseback transaction;

b) Providing a relay point for communications from AIP or Florida regulatory authorities; the management of the Plaintiff deemed this method of communication to be more reliable and convenient than reliance upon direct mail between the United States and Ecuador. The plaintiff granted limited powers of attorney to its lawyers to act on behalf of Vareka on two occasions in which the corporation's officers and directors were in Ecuador and a document had to be signed in Florida.

26) The Contract for Purchase and Sale was signed in Miami, Florida, by Jose Perez, as managing director of the plaintiff, on or about January 16, 1979, and was signed by the corporate defendant in Florida as the seller of the property.

27) Under the Lease, and through and including September 14, 1979, GAMC continued to manage the Quarters on behalf of AIP. GAMC and its President, David Yoblick, had all contacts with tenants at The Quarters, and made all day-to-day decisions with respect to maintenance, tenant complaints, and similar matters, as they had prior to the sale. GAMC furnished monthly financial reports of operations at The Quarters to AIP and Treister.

28) From the inception of the lease through September 14, 1979, no officer, director, employee, shareholder, or other representative of the Plaintiff:

a) Met or communicated with any of the tenants at The Quarters;

b) Paid any utility bills, taxes, or service contract payments applicable to The Quarters; or

c) Took any other action which might be construed as operating or managing the property.

29) The plaintiff did not maintain a corporate office in Miami, Florida. The plaintiff did not maintain a distinct corporate office in Quito, Ecuador, but did

maintain books and records, and did conduct corporate meetings, in the Quito law offices of the corporation's managing director, Jose Maria Perez.

30) The plaintiff's books and records were maintained with the part-time assistance of Mr. Perez' legal secretary and the accountant of another shareholder, in Quito. Otherwise, the plaintiff had no employees in Florida or elsewhere.

31) The only asset acquired by the plaintiff was, and is, The Quarters.

32) By letter dated February 5, 1979, Jose Luis Castro, as plaintiff's attorney-in-fact, directed the corporate defendant to make all lease payments due plaintiff to Account No. 14-778-5, Vareka Investments N.V.— Southeast First National Bank of Miami, Post Office Box 012500, Flagler Station, Miami, Florida 33104".

33) The sole signatories on the plaintiff's account at Southeast First National Bank of Miami were investors of the plaintiff. At all times since that account was opened on or about January, 1979, through September 14, 1979, the account has been maintained by the plaintiff.

34) All rental payments made by the defendant to the plaintiff were mailed directly by the defendant to Southeast First National Bank of Miami for deposit in plaintiff's account therein, in accordance with the foregoing instructions.

35) The Plaintiff established a bank account in Miami for the purposes of:

a) Collecting the purchase monies from the Ecuadorian investors; and

b) Collecting payments of rent under the Lease for distribution to the investors in Ecuador.

36) In August of 1979, AIP notified Vareka that AIP intended to terminate the Lease. This notification was sent to Vareka in Quito, Ecuador via Telex. Upon receiving this notification, the investor/shareholds (sic) of Vareka met in Quito and responded to the advice of termination from Quito.

37) AIP, through its agent GAMC, continued to possess and operate The Quarters after these cases were commenced. Not until October 12, 1979, the month following the filing of these suits, was the plaintiff authorized by Judge Roettger to re-enter the premises.

The foregoing findings establish that the plaintiff was as of September 14, 1979, a passive investment company based in Quito, Ecuador. All of its investment decisions were made there, and the company's capital originated there. While the plaintiff's only substantial asset is the office park located in Florida, the Court is persuaded that a long-term sale/leaseback or net lease of the kind involved here does not establish Vareka's principal place of business within Florida.

The mere fact that a foreign corporation is authorized or licensed to do business in a state does not establish that the corporation's principal place of business is

there. *Arab International Bank and Trust v. National Westminster Bank* 463 F. Supp 1145 (S.D.N.Y. 1979). Significant in this finding is the fact that when AIP decided to terminate the Lease, they directed their communications to the plaintiff corporation in Quito, Ecuador. This indicates that they too considered the corporation's principal place of business to be there. Therefore the Court concludes that the principal place of business of the plaintiff for the purposes of 28 U.S.C. § 1332(c), based on the total activity of the corporation at the time these actions were commenced was in Quito, Ecuador. Diversity jurisdiction exists.

DONE and ORDERED this 17th day of MARCH, 1981.

/s/ Edward B. Davis
UNITED STATES
DISTRICT COURT JUDGE

(2)

NO. 83-1936

# in the Supreme Court of the United States

October Term, 1983

AMERICAN INVESTMENT PROPERTIES, INC.,
a Florida corporation,
LEONARD E. TREISTER,
and JEROME J. COHEN,

*Petitioners,*

*vs.*

VAREKA INVESTMENTS, N.V.,
a Netherlands Antilles corporation,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

AIP, Treister, and Cohen have stated the questions for review as follows:

I. WHETHER THE ASSUMPTION OF DIVERSITY JURISDICTION BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA WAS AN UNWARRANTED EXTENSION OF THE PROVISIONS OF 28 U.S.C. §1332.

II. WHETHER THE FEDERAL COURTS BELOW FAILED TO APPLY FLORIDA SUBSTANTIVE LAW, THUS VIOLATING PETITIONERS' DUE PROCESS RIGHTS AND THE ERIE DOCTRINE.

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NO. 83-1936

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, VAREKA INVESTMENTS, N.V. ("Vareka"; plaintiff and appellee below) respectfully requests that this Court deny the petition for writ of

certiorari of AMERICAN INVESTMENT PROPERTIES, INC., ("AIP"), LEONARD E. TREISTER ("Treister"), and JEROME J. COHEN ("Cohen"; all were defendants and appellants below). The petition should be denied because:

1. Neither the district court nor the court of appeals "extended" federal jurisdiction under 28 U.S.C. §1332; rather, both courts adhered strictly to legal standards previously approved by this Court; and

2. Both the district court and the court of appeals correctly applied Florida law. In fact, the opinion of the court of appeals was authored by a former member of the Supreme Court of Florida. This Court should resist the petitioners' attempt to have the Court review questions that relate solely to state law and, as here, lack federal law implications of any kind.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 724 F.2d 907 (11th Cir. 1984). That opinion denied all seven of the petitioners' (then appellants') points on appeal from unpublished decisions of the United States District Court for the Southern District of Florida. The district court decisions are set forth in the appendix to the petition at pages 22 through 44.

## JURISDICTION

This Court has jurisdiction of the petition under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

The first question sought to be reviewed involves 28 U.S.C. §1332(a) and (c); both are set forth on page 3 of the petition. In addition, the petitioners seek to challenge the "clearly erroneous" test under Fed. R. Civ. P. 52(a).

The second question sought to be reviewed does not involve any genuine federal issue, but claims that the decisions of the district court and the court of appeals misapplied Florida law and thereby violated the petitioners' "due process rights" under the Fifth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

The "Statement of the Case" and "Statement of the Facts" in the petition include numerous statements and characterizations which are argumentative rather than factual. Accordingly, Vareka relies on the sections entitled "Facts" and "Procedural History" in the opinion of the United States Court of Appeals, Eleventh Circuit, reported at 724 F.2d 907, 908-09 (11th Cir. 1984).

Some of the allegations within the petitioners' "Statement of the Facts" are untrue. For example:

1. Actually Vareka was incorporated in part to acquire the office park in Miami at issue in the case below and in part for other investments in Ecuador and elsewhere. The petitioners state incorrectly that Vareka was formed only to acquire the office park.

2. Vareka had and has both officers and employees, and its records and office are outside of Florida in Quito, Ecuador.

3. Vareka conducted and continues to conduct corporate meetings, and all of its corporate decisions have been made in Quito.

4. The funds for investment by Vareka in the Miami office park were raised in Ecuador and only then were transmitted to a Miami bank account for payment to AIP.

5. AIP, Treister, and Cohen fail to distinguish properly between Vareka's pre-litigation and post-litigation activities in Florida. Vareka's post-litigation presence in Florida increased because of AIP's default; when AIP breached its fifteen-year net lease after only six months, Vareka and its foreign principals suddenly found themselves with an office park without long-term management. But Vareka's post-litigation presence in Florida—through its attorneys and new office park managers—is irrelevant, as the petitioners well know. Vareka's place of business was correctly determined *as of September, 1979*, the time at which Vareka commenced its litigation against AIP, Treister, and Cohen. *Ray v. Bird & Son Asset Realization Co.*, 519 F.2d 1081 (5th Cir. 1975).

6. AIP, Treister, and Cohen state incorrectly that, "Vareka conducts no corporate meetings". The record below shows that, like many closely-held corporations, Vareka did conduct business meetings when the two largest shareholders met in Quito to discuss the company and its activities.

7. AIP, Treister, and Cohen apparently attach significance to the fact that Vareka filed an application for authorization to transact business in Florida listing the address of its Miami attorneys as its principal office *in Florida*. As the district court and the court of appeals both recognized, that designation (required by state law) does not in any way suggest that Miami, Florida was Vareka's principal place of business *in the world* (any more than it does for IBM, General Electric, or other multinational

companies doing business in many states and in different countries). *Arab International Bank & Trust Co., Ltd. v. National Westminster Bank, Ltd.*, 463 F.Supp. 1145 (S.D.N.Y. 1979). As a matter of fact, the "principal office" on that form was actually designated "c/o" (in care of) the Miami address on the application, in recognition of the facts that (a) mail service to Ecuador is frequently delayed or interrupted and (b) any communication with Florida's legal authorities ultimately would be referred by Vareka to its Miami attorneys.

There are many facts which were proven below but which were not included by AIP, Treister, and Cohen in their petition. Important facts illustrating the correctness of the decisions below are:

8. Treister and Cohen (the principals of AIP) were veteran Florida real estate operators. Both are lawyers, and Treister has practiced as a real estate lawyer for thirty years (R4 118)*.

9. On the sale and leaseback transaction, AIP made a profit (distributable to its shareholders, officers and directors —Treister and Cohen) in excess of $760,000, although AIP had held the property only a year (R4 122-23; district court finding at R1 244). Treister and Cohen obtained the higher selling price from Vareka by "guaranteeing" Vareka a net minimum percentage return on its investment through the 15-year lease (Plaintiff's Ex. 1, §2.01; R4 108), which Treister and Cohen almost immediately breached.

10. Because of the defaults by AIP, Treister, and Cohen (now candidly admitted by AIP at page 7, paragraph 2 of the petition), Vareka suffered damages in excess of $540,000 (R1

*References to the record are to the four volumes of the Record on Appeal: "R1", "R2", "R3", and "R4"; Exhibits are abbreviated "Ex."

256-63). In their petition, AIP, Treister, and Cohen now concede that the damage amounts were correctly determined; they simply argue that Vareka should not be permitted to collect such damages (suffered during the period 1979-82) until 1994. Not surprisingly, both courts below rejected that "we'll pay it later" argument.

The foregoing facts illustrate that the equities, facts, and contract provisions all favored Vareka, and that the petitioners have consistently sought to delay judgment by raising meritless (but time-consuming) issues relating to jurisdiction and Florida's landlord-tenant damage principles. The default occurred in August, 1979, and the lawsuits were filed in September, 1979. Vareka has yet to recover the first cent from AIP, Treister, or Cohen over the intervening five years.

## ARGUMENT

### ISSUE I—THE DIVERSITY FINDINGS ARE CORRECT

This Court recently denied certiorari in another case presenting this issue—*Jerguson v. Blue Dot Investments, Inc.*, 659 F.2d 31 (5th Cir. 1981); *cert. den.*, 456 U.S. 946 (1982). The important and relatively new principle applied by the Fifth Circuit in *Jerguson*, and by the Eleventh Circuit in this case, is that foreign (in the international sense) corporations are to be analyzed under 28 U.S.C. §1332 just as are United States corporations; they are to be considered dual citizens of both (a) the foreign country in which they are organized and (b) the foreign country or state of the United States in which they maintain their "principal place of business".

The principle of dual citizenship for non-U.S. corporations represented a clear departure from the long-standing

"*Eisenberg* rule", which held that Section 1332(c) applied only to domestic corporations. *Eisenberg v. Commercial Union Assurance Co.*, 189 F.Supp. 500 (S.D.N.Y. 1960). This Court properly upheld the dual citizenship rule of *Jerguson* (which frequently defeats diversity and therefore reduces the federal docket) by denying certiorari.

AIP, Treister, and Cohen simply argue that the district court and court of appeals decided the facts incorrectly. They do not dispute that the "principal place of business" test is inherently factual, or that the case law presently governing the "principal place of business" test was correctly articulated and applied.

This Court does not grant certiorari to review evidence and discuss specific facts (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), and this is particularly true where findings of fact have been concurred in by both the court of appeals and the district court. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated that this Court's standard for review of concurrent findings by two courts below is, "a very obvious and exceptional showing of error". 336 U.S. at 275. That test is even *more stringent* than the "clearly erroneous" test of Fed.R.Civ.P. 52(a).

No error, much less a "very obvious and exceptional" error, has been shown by AIP, Treister, and Cohen. The district court's decisions respecting both jurisdiction and damages were based upon the live, open-court testimony (and cross-examination) of numerous witnesses, and are based upon substantial competent evidence. As the district court pointed out, why did the petitioners send their "lease termination telex" to Vareka in Quito, Ecuador in 1979 if they believed, as they say they do now, that Vareka's "principal place of business" was in Miami? The money for the project

and the decision-making came from Quito, and Vareka and its principals had no contact with the day-to-day operation of the office park in Miami until after the lawsuits were filed (R1 246). Vareka's books and records before the lawsuit were maintained in Quito (R1 247). Based upon that evidence, the concurring findings of fact by both the district court and the court of appeals, and the district court's opportunity to evaluate the credibility of the witnesses and weigh the evidence (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)), this Court should deny certiorari and thereby decline to serve as but a third fact-finder.

## ISSUE II—FLORIDA LAW WAS CORRECTLY AND CONSTITUTIONALLY APPLIED.

It is important to recognize this argument of AIP, Treister, and Cohen for what it really is—a delay to obtain a lower interest rate. By filing this petition, AIP, Treister, and Cohen know that their judgment debt will accrue interest at only 12 percent per annum (Section 55.03, Florida Statutes). Current borrowing rates are considerably in excess of that rate. This petition is just another (and hopefully, the last) round in a five-year holding action against the petitioners' obligation ultimately to "pay the piper".

AIP, Treister, and Cohen offered both courts below a twisted interpretation of Florida law in support of the theory that Vareka's damages should not be calculated or assessed until 1994. Not surprisingly, the district court and court of appeals emphatically rejected that argument. At the time the district judge issued his final opinion, he had been a licensed and practicing Florida lawyer for twenty-two years. The author of the Eleventh Circuit's unanimous opinion has been a licensed and practicing Florida lawyer for twenty-five years, and has served on the Supreme Court of Florida. It is therefore difficult to accept seriously the petitioners' argument that both courts misapplied Florida law.

But it is even more difficult to accept the trumped-up constitutional claim that, by misapplying Florida law, those judges violated the "due process rights" of AIP, Treister, and Cohen. The simple answer to that claim is that no person or entity has a right, constitutional or otherwise, to intentionally default under lease and guaranty agreements, to cause over half a million dollars of damage to the other party to those agreements, and to then attempt to forestall until 1994 the time for payment of those damages.

If this Court denies certiorari, Vareka will at last, after five years of litigation, be able to recover part of its damages. AIP, Treister, and Cohen will not have been deprived of property without due process—they agreed to the damages provisions in the contract documents, they intentionally damaged Vareka, and they have been afforded five years of due process by two (and now, three) federal courts.

## CONCLUSION

The case below is just an action for damages under state law for breach of a commercial lease. It has no federal or constitutional overtones. It involves questions of fact inappropriate for review by this Court. If the three-level federal court system is to work and this Court's difficult backlog is to be cleared, certiorari should be denied where, as here, both the first and second levels of the federal system have concurred in their analysis of the law and the record.

It is respectfully submitted that the petition should be denied.

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## CERTIFICATE OF SERVICE

The undersigned counsel of record for the respondent hereby certifies that on July 12, 1984, he has served three (3) copies of the foregoing Brief in Opposition upon Lawrence H. Rogovin, Esquire, Rogovin & Schwartz, P.A., by causing the same to be delivered by messenger to his offices at 2020 N.E. 163rd Street, Suite 300, North Miami Beach, Florida 33162.

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